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IN THE

Supreme Court of the United States

October Term, 1942.

No. 582.

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

v.

DAVID E. JONES,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR PETITIONER

JOSEPH W. HENDERSON,
GEORGE M. BRODHEAD, JR.,
Attorneys for Petitioner.

International, 236 Chestnut St., Philadelphia

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BRIEF FOR PETITIONER.

This case comes before the Court on writ of certiorari issued to review a final judgment of the United States Circuit Court of Appeals for the Third Circuit.

OPINIONS BELOW.

An opinion was filed on December 5, 1941, by the Honorable William H. Kirkpatrick (R. 4-7). It is not reported.

The opinion of the United States Circuit Court of Appeals, written by Judge Goodrich, was filed on September 21, 1942 (R. 10-14), and is reported in 130 F. (2d) 797.

JURISDICTION.

The jurisdiction of this Court to review the final judgment of the United States Circuit Court of Appeals for the

Third Circuit on a writ of certiorari is provided by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 938 (28 U. S. C. A., Section 347 (a)).

The final judgment of the United States Circuit Court of Appeals for the Third Circuit was entered September 21, 1942 (R. 15). Petition for writ of certiorari was granted by this Court on January 4, 1943 (R. 17).

STATEMENT OF THE CASE.

A civil action was instituted by the respondent in the District Court of the United States for the Eastern District of Pennsylvania to recover damages for maintenance and cure and wages to which the respondent, as a member of the crew of the SS. "Beauregard", claims to be entitled by reason of personal injuries sustained on January 16, 1941. (R. 2, 3.)

The circumstances of the accident, as set forth in respondent's Complaint, are as follows:

> "On or about the 16th day of January, 1941, at or about 5:50 P. M. o'clock and while the vessel was moored to Pier C, Port Richmond, Philadelphia, complainant, in the course of his employment left the vessel on shore leave and was proceeding through the pier towards the street when all the lights on the pier were extinguished and in the ensuing darkness fell into the open ditch at the railroad siding and sustained the injuries which are more specifically hereinafter set forth." (R. 2.)

The petitioner filed a Motion to Dismiss the Complaint for the reason that the respondent's Complaint did not set forth a claim upon which relief could be granted, as the

respondent's alleged injury was not sustained while he was in the service of the vessel (R. 4).

After argument sur Motion to Dismiss Complaint, the aforesaid District Court filed an opinion on December 5, 1941, granting the petitioner's motion and directing entry of judgment, (R. 4-7) and on December 5, 1941, judgment was entered in favor of the defendant and the case dismissed (R. 7).

An appeal was taken by the respondent to the United States Circuit Court of Appeals for the Third Circuit. After argument before Circuit Judges Jones and Goodrich and District Judge Leahy, said court filed a decision reversing the judgment of the District Court and remanding the case for further proceedings not inconsistent with said opinion. (R. 10-14.) The opinion was written by Circuit Judge Goodrich.

Petition for writ of certiorari to review said final judgment was granted by your Honorable Court on January 4, 1943 (R. 17).

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

The petitioner intends to urge the errors assigned in its Petition for Writ of Certiorari, which errors are more particularly set forth therein under "Questions Presented", i. e., those errors relating to the question whether a seaman may receive maintenance and cure from his vessel and her owners when injured, not on board his vessel or in the service of his ship, but after he had left his ship on his own business and was proceeding through the pier to which his vessel was moored and over which pier neither his vessel nor her owners had any ownership, control or management.

QUESTION PRESENTED.

Should a seaman receive maintenance and cure from his vessel and her owners when injured, not on board his vessel or in the service of his ship, but after he had left his ship on his own business and was proceeding through the pier to which his vessel was moored and over which pier neither his vessel nor her owners had any ownership, control or management?

ARGUMENT.

A Seaman Who Left His Ship on Shore Leave for His Own Business and Was Subsequently Injured While on Property of a Third Party Is Not Entitled to Maintenance and Cure.

The respondent, a seaman on the SS. "Beauregard", instituted suit to recover damages for cure and maintenance and wages to which he claimed he was entitled because of personal injuries sustained while on shore leave on and about his own personal business.

The basis of the respondent's cause of action is set forth in Paragraph Five of his Complaint wherein he alleged:

> "On or about the 16th day of January, 1941, at or about 5:50 P. M. o'clock and while the vessel was moored to Pier C, Port Richmond, Philadelphia, complainant, in the course of his employment left the vessel on shore leave and was proceeding through the pier toward the street when all the lights on the pier were extinguished and in the ensuing darkness fell into the open ditch at the railroad siding and sustained the injuries which are more specifically hereinafter set forth." (Emphasis ours.) (R. 2.)

The petitioner filed a Motion to Dismiss the Complaint for the reason that the respondent's Complaint did not set forth a claim upon which relief could be granted, as the respondent's alleged injury was not sustained while he was in the service of the vessel (R. 4).

The District Court properly held that the respondent was not in the service of his ship at the time of his alleged injuries and, therefore, dismissed respondent's Complaint.

(R. 1, 4-6.) The United States Circuit Court of Appeals for the Third Circuit on appeal ruled otherwise on the erroneous theory that the respondent was entitled to recovery because he was injured "in the area immediately adjacent to his place of work through which he, of necessity, had to pass in going or coming". (R. 13.) The Court below in so ruling committed a reversible error, as said decision constitutes an unjustified extension of the established doctrine of maintenance and cure.

It is well established that "the vessel and her owners are liable, in case a seaman falls sick, or is wounded, *in the service of the ship*, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued". *The Osceola*, 189 U. S. 158 (1903), *Chelentis v. Luckenbach Steamship Company, Incorporated*, 247 U. S. 372 (1918); *Pacific Steamship Company v. Peterson*, 278 U. S. 130 (1928); *Calmar Steamship Corp. v. Taylor*, 303 U. S. 525 (1938); *O'Donnell v. Great Lakes Dredge and Dock Company*, — U. S. — (decided February 1, 1943, but unreported). (Italics ours.)

This rule was formulated by your Honorable Court in *The Osceola, supra*, after a consideration of the Rules of Oleron, the Laws of Wisbuy, the Laws of the Hanse Towns, the Marine Ordinances of Louis XIV, the English Merchants' Shipping Act, and the Continental Codes.

That part of the rule which specifies that the injury must be "in the service of the ship" has not been modified, so far as we have been able to ascertain, but, on the contrary, it has been consistently followed. *Pacific Steamship Co. v. Peterson, supra; The Bouker No. 2*, 241 Fed. 831 (C. C. A. 2nd, 1917).

For centuries, a seaman who has gone ashore on his own personal business has not been considered "in the

service of the ship". For example, Article XVIII of the Laws of Wisbuy (13th Century), referred to in *The Osceola, supra* at 169 and quoted at length in *The S. S. Berwindglen*, 88 F. (2d) 125, 128 (C. C. A. 1st, 1937) provided:

> "A mariner being ashore in the master's or the ship's service, if he should happen to be wounded, he shall be maintained and cured at the charge of the ship; but if he goes ashore on his own head to be merry, and divert himself, or otherwise, and happens to be wounded, the master may turn him off; and the mariner shall be obliged to refund what he has received, and besides to pay what the master shall be forced to pay over and above to another whom he shall hire in his place."

This limitation on a seaman's right to maintenance and cure is still the law and is so stated in 1 Benedict on Admiralty (6th Ed. 1940) 254:

> "Sickness or injury occasioned while off duty ashore or by the seaman's own wilful wrongdoing give him no rights against the vessel or her owners."

The respondent's case falls clearly within this established exception.

After the respondent had voluntarily left his vessel and was proceeding *on his own business* through the pier to which the vessel was moored and over which pier neither the petitioner nor its vessel had any ownership, control or management, he certainly was not then "in the service of the ship".

While your Honorable Court has not specifically decided the question as to whether a seaman may recover maintenance and cure under facts stated in the respondent's Complaint, numerous district courts as well as the United

States Circuit Court of Appeals for the Second Circuit[1] have denied such recovery. Furthermore, the status of a seaman on shore leave, so far as it relates to the shipowner's liability to him and for his actions, has heretofore been adjudicated by decisions of the United States Circuit Court of Appeals for the Ninth Circuit.

A review of these decisions will show that the Court below erred both on authority and on reasoning in holding that the respondent was "in the service of the ship" at the time of his accident.

In *Collins v. Dollar S. S. Lines, Inc., Limited*, 23 F. Supp. 395 (D. C. S. D. N. Y. 1938) the libellant, together with other members of the crew of his vessel, engaged in a game of baseball ashore while the vessel was lying in the Port of Singapore. The libellant was injured during the course of the game. Exceptions to the libel were sustained, the Court saying on page 397:

> "It is reasonable and logical to say that if injured in the ship's service the seaman shall be cared for by the ship. *To extend the obligation of the ship beyond this so as to require it to provide maintenance and cure for one who was injured on shore while engaged in his personal affairs would be to place an unfair burden upon the ship and would relieve the seaman of the risk that he himself should properly assume. I find no authority which would justify recovery of maintenance and cure by the libelant.*
>
> "The libelant was injured outside the course of his employment, and was unable to return to work before the voyage ended so he is not entitled to wages while incapacitated." (Italics ours.)

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[1] Said decision is now under review by your Honorable Court upon a writ of certiorari. *Aguilar v. Standard Oil Company of New Jersey*, — U. S. — (certiorari granted January 4, 1943).

In *The President Coolidge*, 23 F. Supp. 575 (D. C. N. D. Wash. 1938) the libellant, while working as a seaman on his vessel, went ashore to the offices of the shipowners for the purpose of answering a long distance telephone call from his wife. Returning to the vessel, the seaman started to ascend a ladder which was made fast to the dock when he received certain injuries. The libellant was refused maintenance and cure, the Court stating on page 576:

> "To *entitle Libelant to recover he must show that he received his injury while engaged in an act of labor in the discharge of the obligations of his employment.* If the injury occurred after Libelant left the labor in which he was engaged in the discharge of the obligation of his employment and while responding to a telephone call on behalf of his wife, which he expected, and while in discharge of that (all a personal matter) an 'act not in the service of the ship' he may not recover for the injury. *The injury was the result of the Libelant's free act and conscious motion of his own will, apart from any obligation of his employment. Meyer v. Dollar Steamship Line*, D. C., 43 F. 2d 425, 426, affirmed, 9 Cir., 49 F. 2d, 1002. The facts in the instant case are clearly within the rule announced by this court 43 F. 2d, supra, affirmed by the Circuit Court of Appeals, 49 F. 2d, supra. When the Libelant laid down his hammer on telephone call, and left the engine room, and proceeded to the telephone office, *he was consciously and voluntarily pursuing a personal matter, an act that was not in the service of the ship.*" (Italics ours.)

In *Smith v. American South African Line, Inc.*, 37 F. Supp. 262 (D. C. S. D. N. Y. 1941) the plaintiff, while at Beira, Africa, obtained leave to go ashore for purposes of his own. When about two miles away from the ship and

in the course of returning to his vessel the seaman was struck by a motorcycle and injured. The seaman's Complaint for maintenance and cure and wages was dismissed.

In *Lilly v. United States Lines Co.*, 42 F. Supp. 214 (D. C. S. D. N. Y. 1941) the plaintiff, a member of the crew, not being on duty, went ashore in the late afternoon to exchange a pair of gloves which he had previously purchased at Le Havre, France. He returned to his vessel early in the evening. It was already dark and, as France was at war, the Port of Le Havre was blacked out. When the plaintiff, who was sober, reached the dock where the vessel was berthed, he attempted to find the gangplank, but fell from the dock into the water. The dock was not controlled by the defendant, and there were no guards, lines, or other means of protection on the dock. The Court granted summary judgment for the defendant and, in denying the plaintiff recovery for cure and maintenance, stated on page 215:

> "As to the second claim based upon maintenance and cure, I am of the opinion that the plaintiff was not injured while 'in the service of the ship'. *Smith v. American South African Line*, D. C., 37 F. Supp. 262, 1941 A. M. C. 212; *The Berwindglen*, 1 Cir., 88 F. 2d 125; *Barlow v. Pan Atlantic and Waterman S. S. Co.*, 2 Cir., 101 F. 2d 697."

In *Wahlgren v. Standard Oil Company of New Jersey*, 1941 A. M. C. 1788 (D. C. S. D. N. Y.) the seaman had left his vessel on shore leave and was injured while riding in a truck about a quarter of a mile from the dock gate. The seaman in his suit under the Jones Act included a claim for maintenance and cure. The Court, in granting summary judgment for the defendant, said on page 1789:

> "Neither can the claim for maintenance and cure be upheld. The plaintiff was not injured in the service

of the ship but while engaged on shore in purely personal pursuits."

In *Aguilar v. Standard Oil Company of New Jersey*, 130 F. (2d) 154 (C. C. A. 2nd, 1942) (certiorari granted on January 4, 1943, — U. S. —) the identical question was determined in favor of the shipowner, and all five of the aforesaid district court cases were cited and approved.

In the *Aguilar* case the plaintiff, whose ship was moored to a wharf, obtained leave to go ashore to attend to personal business. About a half a mile away from the ship, the seaman, while returning to the vessel, was struck by a motor truck and injured. The Court held that the seaman was not in the services of his ship at the time of the accident and that he was therefore not entitled to maintenance and cure, stating on page 155 that:

> "The outlines of the seaman's right to maintenance and cure have remained fairly constant from very ancient times; until Congress sees fit to change its incidents, the courts should enforce it as it is; . . ."

The status of a seaman on shore leave and the liability of the shipowner to and for him during such time has also been considered by the United States Circuit Court of Appeals for the Ninth Circuit.

In *Todahl v. Sudden & Christenson*, 5 F. (2d) 462 (C. C. A. 9th, 1925), the seaman had been ashore on personal business and on his return was injured while crossing the wharf to which his vessel was moored. He sued the owners of his ship and the occupant of the wharf on two causes of action—one to recover under Section 33 of the Merchant Marine Act of June 5, 1920, 41 Stat. 1007, and the other to recover damages under the common law. The demurrer

of the shipowners was sustained, and, on appeal, although the specific question of cure and maintenance was not discussed, the Court in affirming the judgment for the shipowners stated on page 464:

> ". . . here the plaintiff, in voluntarily going ashore, and thus by his own act making his return necessary, was not doing that which his contract of employment bound him to do. The owners of the steamship owed him the duty of providing a safe place in which to perform his work as a seaman. That duty did not extend to his protection when going beyond the premises of his employment for purposes of his own and over premises of which his employers had no dominion or control."

In *Angco et al. v. Standard Oil Company of California*, 66 F. (2d) 929 (C. C. A. 9th, 1933), the chief engineer, while on shore leave, was involved in an automobile accident while driving the shipowner's car. The Court, in denying recovery in an action against the company, described on page 930 the status of a seaman on shore leave, as follows:

> "When Warner left the ship at Kahului he was off duty, upon pleasure bound, and was beyond the scope of his employment. Unless some unforeseen emergency arose he would not again come within the scope of his employment until he returned to the vessel. He was under no instructions to perform any service in any way connected with his employment; his sole responsibility, to return to his ship before she sailed, was a personal one."

See also *Meyer v. Dollar Steamship Line*, 49 F. (2d) 1002 (C. C. A. 9th, 1931) in which the Court carefully discussed the test to determine whether or not a seaman was

in the service of his ship. In the *Meyer* case the seaman, who was not on watch, was injured while engaging in a friendly scuffle with a fellow seaman on board his vessel. The Court, in interpreting the phrase "in the service of the ship", considered its close analogy to the phrase "in line of duty" as applied to soldiers and sailors in the service of the United States and denied recovery for maintenance and cure on the ground that the seaman was not in the service of his ship.

We know of no decision extending the right of recovery by a seaman for maintenance and cure to the extent allowed in this proceeding. The decision, if not reversed, will represent an extreme departure from established principles governing recovery for maintenance and cure.

The two cases which might be cited as indicating a contrary rule do not justify such a classification. Furthermore, if the doubtful exception of *Hogan v. SS. J. M. Danziger*, 1938 A. M. C. 685 (D. C. E. D. N. Y. 1938), is in conflict it has been overruled by the *Aguilar* case. In the *Hogan* case the libellant alleged "that an injury ashore was sustained while libellant was in the service of the ship and walking over the property at which his vessel was berthed to go aboard and take up his 4.00 p. m. watch". This allegation made no mention of "shore leave", and, although the question was considered a close one, the pleading was held sufficient and the respondent's exceptions were overruled. The old case of *Reed v. Canfield*, 20 Fed. Cas. 426 (Case No. 11,641) (C. C. D. Mass. 1832), also cited by the Court below but ably distinguished by the District Court in its opinion, "clearly does not reach the facts in the present case". (R. 6.) In the *Reed* case, the seaman together with other members of the crew, pursuant to orders, had rowed the ship's mates from the vessel's anchorage to

shore. The seaman was injured when he and his fellow seamen, after having spent several hours on shore with the permission of the ship's mates, were rowing the boat back to their ship. At the time of his injuries the seaman was actually engaged in carrying out orders issued to him by his mates and, therefore, in the service of his ship.

Any attempt to distinguish the *Aguilar* case, the *Collins* case, the *Smith* case and the *Wahlgren* case from the instant case on the theory that the injuries in those cases occurred at a considerable distance from the ship, while in this case they occurred on the pier to which the ship was moored, is both illogical and unsound. Such a distinction is purely arbitrary and cannot form the basis of a sound judicial determination. Neither distance alone from the ship nor the fact that the accident occurred on a pier to which the ship was moored but over which neither the shipowner nor its vessel had any ownership, control, or management can be the determining factor. We can readily visualize piers covering many city blocks and extending over considerable territory. Moreover, in *The President Coolidge* and in the *Lilly* case the injuries to the seaman occurred on or about the dock and recovery was denied notwithstanding the proximity of the vessel to the place of accident.

"In the service of the ship", both on reason and authority, includes what happens to seamen aboard the ship irrespective of whether or not they be on active duty, subject to recognized exceptions; but, when seamen are off the ship, it extends solely to those seamen who are on the business of the ship and not on their own personal business or on shore leave.

A seaman when away from his ship on shore leave cannot, in the absence of circumstances showing that he was in fact within the call of duty and subject to orders, be said to be continuously in the service of his ship. This distinction was recognized by the District Court when Judge Kirkpatrick stated in his opinion that ". . . the complaint in this case shows nothing but 'shore leave', and, as stated, implies nothing more than an obligation to return to the ship at some specified time". (R. 6.)

As stated by Judge Kirkpatrick in his opinion, "on shore leave he may go wherever he pleases, and if he goes where he cannot be reached he is to all practical intents and purposes exempt from any call to serve the ship until he returns; and whatever his general obligation, he is actually beyond the power and authority of the ship's officers". (R. 6.)

The United States Circuit Court of Appeals for the Third Circuit endeavored to justify its decision by distinguishing the *Meyer* case from the instant case and restricting the holding in the instant case to "the question of the seaman's rights with regard to injury suffered in the area immediately adjacent to his place of work through which he, of necessity, had to pass in going or coming" and left "open for decision when the case arises, what might be the legal liability if this plaintiff, having left the pier safely, had been hit by a truck on the public streets of Philadelphia", (*Smith v. American South African Line, Inc., supra*) or "if he sprained his ankle playing baseball on shore", (*Collins v. Dollar S. S. Lines, Inc., Limited, supra*). (R. 13.)

We fail to see any distinction between an accident occurring on the premises adjacent to the seaman's vessel

over which the vessel had no dominion and an accident occurring several miles away from his vessel when the seaman in each instance is on shore leave and on and about his own business. The proximity of the vessel to the place of the accident should not be the determining factor. Rather, the shipowner's liability is dependent solely on the question whether or not the seaman at the time of the accident was on his own personal business and pleasure or carrying out an order of the officers of the ship. In the former situation, clearly the seaman is not "in the service of the ship".

Cure and maintenance is recoverable for injuries sustained while a seaman is in the service of his ship, irrespective of fault or negligence, because the seaman is entitled, by the peculiar relationship which he has assumed, to such protection in the performance of services required by the officers of the ship. The shipowner, having dominion and control over the vessel, is, and should be, in a position to see that proper protection at all times is available for the health and safety of the seaman who has entrusted his safekeeping to the officers of the ship. However, when a seaman leaves the ship on shore leave, the reason for the rule disappears, for the shipowner and the officers of the ship have no control whatever of the premises over which a seaman travels when ashore and are consequently unable to protect the seaman in any way. Whereas, on the contrary, they do have control over their ship. In this case the respondent was injured because the lights on the pier through which he was passing were extinguished and he was caused to fall into the open ditch because of the ensuing darkness. (R. 2.) The petitioner in this case had no more control over the pier and the conditions on the

pier, including the lights on the pier and their subsequent extinguishment, than the shipowner in the *Aguilar* case had over the operation of the motor truck which struck that seaman, and in both cases the shipowner had no control whatsoever over the actions of the seaman himself. It is immaterial whether the place where the seaman is injured happened to be adjacent to the vessel or located at a great distance away. In each instance, the officers of the ship have no control either of the instrumentality with which the seaman may come in contact, or of the actions of the seaman himself, and in each case the liability of the ship and the shipowner should be the same. However, in either case, the seaman is not without relief, for he may recover damages from a third party because of its negligence just as the respondent is now attempting to do by suit against the owner of the pier. *Jones v. Reading Co.*, 45 F. Supp. 566 (D. C. E. D. Pa. 1942).

The shipowner is not an insurer of the health and safety of a seaman at all times during the voyage. Maintenance and cure has been denied seamen when the injury was due to intoxication, *The SS. Berwindglen*, 88 F. (2d) 125 (C. C. A. 1st, 1937), and *Barlow v. Pan Atlantic S. S. Corporation*, 101 F. (2d) 697 (C. C. A. 2nd, 1939); when due to venereal diseases and gross acts of indiscretion, *The Alector*, 263 Fed. 1007 (D. C. E. D. Va. 1920); when due to a personal fight, *Lortie v. American Hawaiian Steamship Company*, 78 F. (2d) 819 (C. C. A. 9th, 1935); *Yukes v. Globe S. S. Corp.*, 107 F. (2d) 888 (C C. A. 6th, 1939); and when due to wilful misconduct, *Oliver v. Calmar S. S. Co.*, 33 F. Supp. 356 (D. C. E. D. Pa. 1940). The only duty which the shipowner and his vessel owe to a seaman, so far as maintenance and cure is concerned, is similar to

that afforded employees by workmen's compensation laws, namely, to provide a safe place for the seaman to perform his work wheresoever that work is to be done. Moreover if the respondent were seeking relief under The Pennsylvania Workmen's Compensation Act of June 21, 1939, P. L. 520 (77 P. S. §§ 1-1023), he would not be entitled to receive compensation. As humanitarian and liberal as is that act and similar state workmen's compensation laws, compensation is only payable to an employee who is injured beyond the premises of his employer if that employee is *actually* engaged in the furtherance of the business or affairs of his employer. *Maguire v. James Lees and Sons Co.*, 273 Pa. 85, 116 Atl. 679 (1922); *Palko v. Taylor-McCoy Coal & Coke Co.*, 289 Pa. 401, 137 Atl. 625 (1927).

Not only is there no authority to support the respondent's contention in this case, but we see no reason why a vessel should have the added burden of taking care of a seaman when he is injured ashore in any place where he may voluntarily choose to go or while he voluntarily engages in personal activities of his own selection. The respondent in going ashore was consciously and voluntarily acting for his own account and the cause of his injury, to wit, the extinguishing of the lights on the pier, was totally unrelated to his employment and was clearly beyond the control of the petitioner. The respondent had disassociated himself physically from the vessel and had placed himself beyond any occurrence normally incident to the operation of a ship which might or could cause his injury. Moreover, as held by the District Court, he had effectively removed himself from the call of duty. (R. 6.)

CONCLUSION.

We, therefore, submit that the judgment of the Court below should be reversed and a judgment of dismissal should be entered in favor of the petitioner.

Respectfully submitted,

JOSEPH W. HENDERSON,
GEORGE M. BRODHEAD, JR.,
Attorneys for Petitioner.